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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2307 OF 2007

Anwar Ahmed Khalil Ahmed ...Petitioner.

Vs.

Abdul Haque Sirajuddin Qureshi ...Respondent.

Mr. R.D.Suryawanshi for the petitioner.

Ms. A.G.Bhaktwani for the respondent.

CORAM : ANOOP V. MOHTA,J.

DATED : 3rd October, 2007

JUDGMENT :-

1. By this petition dated 29th March, 2007, challenge has been made to the order dated 6th March, 2004 passed by 2nd Additional District Judge, Thane, whereby the petitioner's (original defendant), application for condonation of delay in filing the first appeal, was dismissed. On 10th September, 2007 none appeared for respondent when the matter was called out and therefore, after hearing the petitioner, the present petition was allowed. Later on immediately, the learned counsel appearing for the respondent appeared and requested for re-hearing of the matter. As the order was not signed, and as the request was made immediately on the same day, the matter was kept for re-hearing.

2. To avoid the multiplicity of the proceedings, I re-heard the matter.

3. After hearing both the parties, the earlier order though announced but was not signed of allowing the petition has been recalled. Admitted facts on record are that the judgment and decree passed and regularized in R.C.S. No. 285/1987 by the Civil Judge, Junior Division, Bhiwandi dated 17/03/1997, as the defendant inspite of the opportunities available, failed to file written statement and not contesting the matter.

4. Before the District Judge, Thane, therefore, an application for condonation of delay was preferred mainly on the ground that the compromise/ settlement talks were going on between the parties and therefore, the appellant-petitioners neither filed written statement nor contested the matter and therefore, ex-parte decree came to be passed.

5. The learned Judge after considering the rival contention as well as material placed on record, held that the applicant failed to establish the sufficient

cause for condoning the delay in filing the appeal by observing in para 9 and 10 as under:-

"9. Even as per his pleading, the notice of execution proceeding was served on him in July, 2002, however, the present application is filed in January, 2003. The reason assigned by the applicant is that he had been to his native place for some urgent work and when he returned to Bhiwandi, he contacted the Advocate and filed the application.

10. It is necessary to mention here that there is no mentioned in the application what was his urgent work and for how much period, he had been to his native place and only vague allegations are made which also does not find support from any document or other evidence that he was not in Bhiwandi and had been to his native place for some period. Thus this stand also clearly indicate inaction on the part of the applicant. Reliance has been placed by the learned counsel for the opponent on the authority **AIR 1998 S.C. 2276,** in order to show that the courts have no power to extend period of limitation on equitable grounds. He further relied on the authority **2002(2) ALL MR 776** on the point that Appellant seeking

condonation of delay must show diligence on his part. He further relied on the authority **AIR 1981 S.C. 1921,** in order to show that strong case on merits, not a ground for condonation of delay. Further he relied on the authority **1999(4) ALL MR 57** where it is held that explanation for delay was not bonafide and no sufficient cause for condonation of delay was made out. He further relied on the authority **2002(2) ALL MR 778.** The principles laid down in the said authority certainly help to the submission of the learned counsel for the opponent."

6. The learned counsel appearing for the respondent has strongly relied on **Shri. Nivruti G. Ahire Vs. State of Maharashtra & Ors. 2007(4) ALL MR 347.** The decision of the Bombay High Court referring to Section 5 of the Limitation Act especially on the extract of para 14, which is as under:-

> . "S. 5 - If sufficient cause is not proved nothing further has to be done: the application for condoning the delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bonafides may fall for consideration; but the scope of the

> enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant."

7. In that case the Division Bench has not condoned the delay of 108 days in filing the review petition.

8. Admittedly in the present case, there is no reason and or sufficient material to justify the delay even in filing the present writ petition. The impugned order is of 06/03/2004, the writ petition is of dated 29th March, 2007. The suit is of the year 1987. The ex-parte decree is dated 17/03/1997. The appeal and application for condonation of delay in question filed on 2nd January, 2003. There is no material to accept bare allegation that the parties were settling the matter. Therefore, in good faith never contacted and enquired about the suit. There is no positive averments of settlement or compromise though discussion was going on.

9. Taking all above facts and law into consideration, I am inclined to accept the submission as raised by the learned counsel appearing for the respondent and as there is sufficient case made out, I am, therefore, inclined to reject the present writ petition, as there

is no case made out by the petitioners to condone the delay.

10. In view of the judgment in **Shri Nivrutti (Supra),** based on the various Supreme Court Judgments, in view of the facts and circumstances of the case as the sufficient facts are not proved, I am inclined to exercise the discretion, after hearing both the parties, in favour of the respondent. The petitioners-appellant was not diligent and not proved his bonafide and failed to show the sufficient cause.

11. Therefore, the present petition is dismissed.

(ANOOP V. MOHTA, J.)